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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 273

BOSTON FIVE CENTS SAVINGS BANK, THE NEW ENGLAND TRUST COMPANY AND OLD COLONY TRUST COMPANY, ALL OF BOSTON,
Appellants,

v.

CITY OF NEW BEDFORD,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Superior Court of Massachusetts entered on January 16, 1958, pursuant to a rescript of the Supreme Judicial Court of Massachusetts, received on January 16, 1958, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

(*a*) The Opinions Below.

The original opinion of the Supreme Judicial Court is reported in Mass. Advance Sheets (1958), p. 107, and in 147 N.E. (2d) 187. It is dated January 15, 1958. Two months later the first opinion was canceled and a new one was filed on March 14, 1958, but dated back to January 15. This opinion is reported in Mass. Advance Sheets (1958), p. 489, and in 148 N.E. (2d) 637. It corrected various mistakes made in the first opinion. A copy of it will be found in Appendix A of this Statement (p. 37). It has not yet appeared in the official bound volumes of the Massachusetts reports.

(*b*) The Grounds on which the Jurisdiction of this Court is Invoked.

The suit, brought in the Superior Court for Bristol County, was a petition for a writ of mandamus (R. 1*) filed by the City of New Bedford against the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (created by Chapter 544 of the Massachusetts Acts of 1948) and the five members of the Authority individually, seeking that the respondents be ordered to comply with Section 1 of the recently enacted statute of Massachusetts (Acts of 1956, Chapter 747) so far as it applies to New Bedford. A copy of the latter statute is contained in Appendix B hereto annexed (p. 45). The defense was based on the alleged unconstitutionality under the Federal Constitution of Section 1 of the Act of 1956.

At the outset of the trial in the Superior Court the three banks, which are holders of bonds of the Authority and are the present appellants, were admitted as intervening parties respondent (R. 16, 33).

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*"R." refers to the typewritten copy of the record certified by the clerk of the trial court.

The Superior Court ordered the writ of mandamus to issue against the Authority and its members (R. 29); and the respondents named in the Notice of Appeal duly excepted to the order and to the refusal of certain requested rulings, raising the constitutional questions, which are quoted below on page 7. The exceptions were overruled by the Supreme Judicial Court, which thus affirmed the action of the court below, subject to a minor verbal change in the language of the writ of mandamus to be issued. The rescript of the Supreme Judicial Court was issued as above stated on January 15, 1958, and received in the Superior Court the next day.

By an order entered in the Superior Court on May 21, 1958, as of January 16, 1958 (R. 60), the required verbal change in the original final order was made.

The order appealed from, in its original and substituted form, and the reason for the change, appear in Appendix F below (p. 72).

The Notice of Appeal (R. 42) was filed in the Superior Court, Bristol County, on April 14, 1958, naming as the appealing parties the bondholders, the Authority and its surviving members (Sherrill having died), except the respondent Backus, who appeared by other counsel, and the respondent Perrone, the member from New Bedford, who appeared *pro se* and has taken no part in the case except to file an answer. As the arguments in the state court in behalf of parties named in the Notice of Appeal were based wholly on the rights of the bondholders, and as the Authority and the individual members would seem to have themselves no substantial rights entitling them to sustain an appeal, the appeal has been dismissed as to them on the motion of the respondents (R. 57).

By an order under Rule 13, entered on May 21, 1958, by the justice of the Superior Court before whom the case had

been tried, the time for docketing the appeal was enlarged to August 15, 1958 (R. 57, 58).

The statutory provision believed to confer on this court jurisdiction of the appeal is contained in 28 U.S.C. § 1257 (2), and cases sustaining the jurisdiction are

W. B. Worthen Co. v. *Kavanaugh,* 295 U.S. 56.
Treigle v. *Acme Homestead Association,* 297 U.S. 189.
Indiana ex rel. Anderson v. *Brand,* 303 U.S. 95.
Wood v. *Lovett,* 313 U.S. 362.

The case of the appellants is based entirely on the contention that Section 1 of the Act of 1956 (Appendix B, p. 45) is invalid under the Federal Constitution. If it is invalid, Section 2 would naturally fall with it.

(*c*) The Questions Presented.

1. Does Section 1 of Chapter 747 of the Massachusetts Acts of 1956 violate Section X of Article I of the Constitution of the United States by impairing the obligations of the Commonwealth of Massachusetts on its contracts with the future buyers of the bonds of the Steamship Authority contained in Chapter 544 of the Massachusetts Acts of 1948, amended in a few respects by Chapter 142 of the Acts of 1949 (copies of both of these Acts being annexed hereto in Appendix C), with particular reference to that part of Section 6 of the Act of 1948 authorizing bond issues, which reads as follows:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any

way that will affect adversely the interests and rights of the holders of such bonds."

2. Does Section 1 of the Act of 1956 violate Section X of Article I of the Constitution of the United States by impairing the obligations of the contract between the Authority and the future buyers of its bonds, the making of which contract was duly authorized by Sections 8 and 12 of Chapter 544 of the Acts of 1948? The contract is contained in the Resolution adopted by the Authority, accompanying and authorizing the issue of its bonds. A copy of the Resolution was introduced in evidence at the trial in the Superior Court and was marked Exhibit 4 (Bill of Exceptions,* R. 34).

3. Does Section 1 of the Act of 1956 violate the Fourteenth Amendment of the Federal Constitution by depriving the bondholders of vested rights without compensation?

(*d*) Statement of the Case.

The Manner in which the Constitutional Questions were Presented.

At the beginning of the trial of the petition for mandamus in the Superior Court, and before the introduction of any evidence, "it was stated by counsel for the above named respondents [who included the present appellants] that if the court should order the writ to issue the case would ultimately go to the Supreme Judicial Court on the question of constitutionality of the Act of 1956; that in the Superior Court the Opinion of the Justices, Mass. Adv.

* Unless otherwise specified, references herein to the Bill of Exceptions are to that filed by all of the respondents except Backus and Perrone.

Sh. (1956) 1187, would, of course, be followed." And accordingly "The question of constitutionality was not argued in the Superior Court, but was covered by requests for rulings in order to save the respondents' rights to submit that question to the Supreme Judicial Court" (Bill of Exceptions, R. 34).

The *Opinion of the Justices* referred to is now reported in 334 Mass. 765. It was an advisory opinion given to the Governor and Council, in which three questions were asked as to Chapter 747 of the Acts of 1956. Question 3 reads as follows:

> "3. Since bonds of the Authority authorized by Chapter 544 of the Acts of 1948, as previously amended, have been issued and are outstanding, is said Chapter 747 of the Acts of 1956 an unconstitutional impairment of the contract represented by said bonds, because of:
>
> "(a) the provisions of Section 1 of said Chapter 747 of the Acts of 1956, changing the powers and duties of the Authority, or
>
> "(b) the provisions of Section 2 of said Chapter 747 of the Acts of 1956 changing the proportion of assessments to be made by the Commonwealth for deficiencies in operations of the Authority?"

The complete answer of the Justices was as follows:

> "We answer Question 3 (a) and 3 (b) 'No.' This subject was also recently covered by what was said in *Opinion of the Justices, ante,* 721, 737, 740-741."

Question 3 (a) is the only one here material.

Although such advisory opinions are not adjudications of the court and are not binding in subsequent litigation,

it was, of course, plain that the positive answer "No" to question 3 (a) would be followed by the judge of the Superior Court.

The requests for rulings on the constitutional questions were (Bill of Exceptions, R. 37):

> "4. The provisions of St. 1948 c. 544 inserted for the protection of the future buyers of the bonds and to facilitate the sale of the bonds at low rates of interest and the accomplishment of the purposes of the Commonwealth, constitute a contract between the Commonwealth and the bondholders, the obligation of which cannot be impaired by legislation.
>
> "5. St. 1956, c. 747 is invalid under Section 10 of Article I of the United States Constitution.
>
> "6. St. 1956, c. 747 is invalid under both the Federal and the Massachusetts Constitutions as taking property of the bondholders without compensation in that it defeats and substantially impairs rights vested in the bondholders under St. 1948 c. 544."

The presiding Justice refused these requests subject to the exceptions of the respondents, and in the Supreme Judicial Court the exceptions were overruled.

In *Manhattan Life Ins. Co. of New York* v. *Cohen,* 234 U.S. 123, 134, there is a reference to "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

And in *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U.S. 182, 185-186, the court said:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in

question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

The Facts Material to the Consideration of the Questions presented.

The Act of 1948 was enacted and the Steamship Authority established for the benefit of the islands and not for the benefit of either of the two mainland ports, New Bedford and Woods Hole (which is a part of the Town of Falmouth). Water transportation to the islands is essential and the object of the Act was to provide it, as is stated in Section 1 of the Act. That it was adopted for the benefit of the islands is further shown by the fact that of the taxes to be assessed under Section 9 to meet the deficiency in any year resulting from the failure of the earnings to cover the cost of service 75 per cent was to be levied upon the small island communities and only 15 per cent upon the City of New Bedford, with a population of more than 100,000.

Beginning with the first full year of its operations, 1950, the Authority has been unable in any year to earn the cost of service as defined in Section 5 of the Act of 1948 (Bill of Exceptions, R. 35; Exhibit 1; and see the opinion of the Supreme Judicial Court, Appendix A, at p. 40).

From an early date in the history of the Authority it has endeavored to improve its earnings by suspending winter service at New Bedford, which is much further from the islands than is Woods Hole. The islands have a large summer population each year and whatever profits are made by the steamship line must be made during the sum-

mer months, the difficulties being caused by the heavy winter losses. The earlier efforts of the Authority to suspend winter service at New Bedford were thwarted by two successive suits brought by the City of New Bedford, each of which reached the Supreme Judicial Court.

> *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority,* 329 Mass. 243.
> *Same* v. *Same,* 330 Mass. 422.

The decisions in these cases construing the Act of 1948 with respect to the powers of the Authority, and particularly the second case, in which its power to suspend winter service at New Bedford was fully confirmed, are considered later in the concluding section of this Statement.

Such service was actually suspended in the winter of 1955-6 (Bill of Exceptions, R. 36; and the opinion of the Supreme Judicial Court, Appendix A, at p. 42).

Having failed in the court, the City of New Bedford transferred its contest with the Authority and with the islands (which had intervened in the second of the cases above referred to in support of the Authority's contention that it had the right to suspend winter service at New Bedford) to the legislature, where its influence is vastly greater than that of the islands. A bill was introduced on the petition of various members of the legislature from New Bedford, and was finally enacted as the Act of 1956, which is under attack in this case. When bills were later introduced, in 1957, to repeal the Act of 1956, the island communities supported them at the hearing (Backus Bill of Exceptions, R. 31).

The important part of the Act of 1956 is the requirement that winter service at New Bedford must be main-

tained permanently, no matter what the financial loss to the Authority may be in future years, and that such service must be provided by a particular kind of steamer regardless of cost and of the fact that this requirement may seriously interfere with the service to be furnished at the island ports.

The deficiency in the earnings of the Authority in 1956 amounted to $111,918.33 (Exhibit 1, Bill of Exceptions, R. 36). The budgeted deficiency in 1957 was $340,000, estimated, of course, on the basis of winter service at New Bedford (the reserve fund of $200,000 provided for in the Act of 1948 having been used up) (Bill of Exceptions, R. 35; and see the opinion of the Supreme Judicial Court, Appendix A, at p. 40).

The Rights of the Bondholders.

Bonds of the Authority are now outstanding in the amount of nearly $6,000,000 (Bill of Exceptions, R. 34). Of these the three banks which are now the appellants own in the aggregate $643,000 (R. 33; and see Appendix A, at p. 69). Under the provisions of Section 902 of the Resolution, later referred to, which constitutes the contract of the bondholders with the Authority, the appellants, holding more than 10 per cent of the outstanding bonds, are entitled to prosecute this appeal for the benefit of all holders of outstanding bonds (Appendix D, p. 69).

1. The purposes of the Act of 1948 could be carried out only if the necessary capital could be raised by the sale of bonds to the public. In order to make the bonds readily salable the legislature, while expressly disclaiming by Section 2 of the Act of 1948 any pledge of the credit of the Commonwealth to the payment of the principal or interest of the bonds, inserted several provisions in the Act for

the protection and security of the purchasers of the bonds, which are claimed by the appellants to constitute contracts between the Commonwealth and the purchasers. They were obviously inducements held out to investors.

One of the most important of these provisions is that contained near the end of Section 6 of the Act, reading as follows:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds."

Section 6 contains also a provision guaranteeing the freedom of the Authority from competition "while any bonds issued by the Authority remain unpaid" except by vessels of 100 tons gross tonnage or less.

There is a further provision in Section 6 giving the Authority the option to make the bonds redeemable before maturity; and Section 9, by an amendment by St. 1949, chapter 142, section 2 (Appendix C, pp. 62-63), requires that after the distribution of the revenues of the Authority among various funds the remaining revenues shall be used within a reasonable time for the purchase or redemption of bonds.

By Section 7 of the Act, exempting the Authority from the payment of any taxes, it is expressly provided that "the bonds and refunding bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation within the commonwealth."

By Section 11 of the Act broad provisions are made for the eligibility of the bonds for investment by public officers, fiduciaries, etc., and making the bonds securities which may properly be deposited with public officers or

agencies for any purpose for which the deposit of bonds of the Commonwealth is authorized by law.

Section 12 gives any holders of bonds or refunding bonds the right to enforce by any suit or proceeding *all* rights granted them under the statute, except as they may be restricted by the Resolution (see p. 14, below).

2. The contract between the Authority and the bondholders, duly authorized by Sections 8 and 12 of the Act of 1948, is contained in the Resolution accompanying and authorizing the issue of the bonds of the Authority, and to a minor extent in the bonds themselves, of which the form appears in the Resolution at pages 3-4.

The Resolution, introduced in evidence as Exhibit 4, has been filed in this court pursuant to an order of the trial judge dated May 21, 1958, on the motion of the appellants (R. 55, 56), and excerpts therefrom which are believed to be material appear in Appendix D (p. 65).

Near the beginning of the Resolution, in Section 101, it is provided that "all of the covenants, agreements and provisions of this Resolution shall be for the benefit and security of all and singular the present and future holders of the bonds and interest coupons so issued or to be issued," and, in the form of bond, as set out in the Resolution, pp. 3 and 4, it is provided that the bonds are issued pursuant to the Resolution, "reference to which is hereby made for the provisions, among others, with respect to the collection and disposition of revenues, the funds charged with and pledged to the payment of the interest on and the principal of the bonds, the nature and extent of the security, the terms and conditions on which bonds are or may be issued, the rights, duties and obligations of the Authority and the rights of the holders of the bonds, and, by the acceptance of this bond, the holder hereof assents to all the provisions of the Resolution."

Some of the more important provisions of this contract which the appellants contend are impaired by Section 1 of the Act of 1956 are quoted in Appendix D (p. 65, below).

The Act of 1956 obviously increases the operating expenses of the Authority and therefore makes it more difficult for it to earn enough to cover the sum needed for the payment of interest and principal of the bonds, which sum is the first charge on the revenues after operating expenses and working capital of $200,000. (See Section 2 of Chapter 142 of the Acts of 1949, quoted in Appendix C, pp. 62-63. As to the $200,000 see the last paragraph of that section.) It thus impairs the obligation of the Authority to pay the principal and interest of the bonds "solely from the funds provided therefor in the Act," and it lessens the value of the pledge to the bondholders of the funds available for such payment (Resolution, Section 601, Appendix D, pp. 66-67).

The Act of 1956 impairs the obligation of the Authority to the bondholders not to "create or suffer to be created" any charge upon its revenues equal with or prior to the bonds, this being the effect of any additional charge to operating expenses (Resolution, Section 604, Appendix D, pp. 67-68; and see the similar provision in Section 610). It impairs the obligation of the Authority to fix such rates as may be necessary or proper to insure sufficient income to meet the cost of service (Section 410), and its obligation to apply surplus earnings to the redemption of bonds (Section 404), its covenant to incur no current expenses unless reasonable and necessary (Section 403), to employ no more persons than are reasonable and necessary and to operate the steamship line in an efficient and economical manner (Section 603), and the further covenant in Section 608 "that none of the revenues or income of the Steamship Facilities will be used for any purpose other than as provided in this Resolution, and that no contract or con-

tracts will be entered into or any action taken by which the rights of the bondholders might be impaired or diminished."

The Act of 1948 provides in Section 12 (Appendix C, p. 59) for the enforcement by any bondholder of *all* rights given by the Act, "except to the extent the rights herein given may be restricted by such resolution." The Resolution provides in Section 902 (Appendix D, p. 69) that the holders of not less than 10 per cent of the outstanding bonds may enforce "any" rights given the bondholders either by the Act of 1948 or by the Resolution.

3. The third contention of the appellants is that, irrespective of the questions of impairment of the obligations of the contracts of the bondholders with the Commonwealth and with the Authority, the bondholders have vested rights which cannot be destroyed under the Fourteenth Amendment without compensation.

An analysis of the answer of the Justices of the Supreme Judicial Court to question 3 (a), quoted above (p. 6), shows that the answer "No" was in fact qualified by an exception as to vested rights. The answer states as the sole ground for it that the subject was "recently covered by what we said in Opinion of the Justices" (334 Mass. 721, 737, 740-741). This opinion was given with reference to a pending bill creating the Massachusetts Port Authority, and the only part of that opinion which is cited and now material is page 737, where the Justices were answering together questions 2 and 3 (334 Mass. at p. 728). These questions asked whether the proposed Act would violate the Massachusetts Constitution as not being " 'subject to revocation or amendment' until provision is made for retirement of all bonds issued by the authority." After expressing the opinion that the bill would be subject to

revocation or amendment (treating the Authority like a municipal corporation), the Justices went on to say, on page 737, cited in the Steamship Authority Opinion:

> "The power of revocation and amendment is not, however, without limits. Even in the case of a public corporation like the Authority where the granting of a charter or franchise creates no contract with the State, other constitutional limitations are applicable."

And they answered the questions by stating that the pending bill "would be 'subject to revocation and amendment' which would not defeat or substantially impair without compensation rights vested under the statute" (p. 738).

This answer was incorporated in the Steamship Authority Opinion, and the Justices thus, as in the Port Authority Opinion, left unanswered the question whether vested rights were impaired by the Act of 1956.

The only security in the ordinary sense of the term which was given to the bondholders was the lien given them by the pledge of the revenues of the Authority after the payment of operating expenses and such contribution, if any, as was necessary to keep the working capital up to $200,000. The Authority gave this pledge to the bondholders by Section 601 of the Resolution, as pointed out above. This gave the bondholders a vested right and it is impaired by the increase in the operating expenses resulting from compliance with the Act of 1956.

The bondholders also, it is submitted, have vested rights against the creation of any charge upon earnings equal with or prior to the bonds (Sections 604, 610, of the Resolution).

It is submitted further that the statement of Qua, C.J., in the opinion in 330 Mass. at p. 431, quoted below (pp. 21-22), construing the Act of 1948, means that the Act must be construed as if it provided in express language that "management of the project is to be vested in the authority" and that this includes the power to adapt the service furnished to the amount of traffic offered, proper consideration of costs and operating problems, including the necessity of laying up vessels for repairs, the unusual necessities of the islands and the seasonal character of the business. The bondholders claim that this construction of the statute supports their claim to a contractual right against the Commonwealth to enforce a continuance unimpaired of the powers, duties and existence of the Authority.

Furthermore, on general principles, the bondholders have vested rights in the performance of all of the contractual provisions of the Act and the Resolution.

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."
>
> Brandeis, J., in *Lynch* v. *United States*, 292 U.S. 571, 579.

An important fact to be considered in this case is that the financial difficulties of the Authority and the long controversy between the islands and New Bedford have led to the appointment of a Special Commission, which is now investigating and studying the operation of the Steamship Authority and is charged with the duty of reporting to the legislature "the results of its investigation and study, and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into

effect." This Commission was appointed and is acting under two resolves of the Massachusetts legislature, Chapter 78 of the Resolves of 1957 and Chapter 64 of the Resolves of 1958, copies of which are printed herewith in Appendix E.

It is essential that the Commission, and the legislature as well, should be finally advised as to the validity of Section 1 of the Act of 1956, and whether new legislation impairing the "powers, duties and existence" of the Authority may be constitutionally enacted.

(*c*) The Grounds upon which it is contended that the Federal Questions are Substantial and require Plenary Consideration.

It is difficult to see any basis for an argument that the constitutional questions here presented are *not* substantial and it is submitted, for reasons hereafter stated, that no such basis is shown by the wholly superficial and inadequate treatment of the matter in the opinion of the Supreme Judicial Court.

The Act of 1956, Section 1, which takes from the Authority the control of details of service and assumes that the legislature has such control, and thereby brings the management of the steamer line into politics, is inconsistent with various provisions of the Act of 1948, designed to facilitate the raising of the necessary capital by the sale of bonds attractive to investors. On this branch of the case the only question is whether these provisions, and particularly that assuring the continuance unimpaired of the "powers, duties and existence" of the Authority, amount to contracts between the Commonwealth and the bondholders; and it appears to be admitted in the opinion of the Supreme Judicial Court that they do, but the court treats them as only of minor importance. That the provisions of

the Resolution constitute contracts between the Authority and the bondholders cannot be denied. Many of them are being impaired by the Act of 1956, but they are wholly disregarded in the opinion save for a single reference to one of them, later referred to (pp. 23-24). And the question as to what vested rights, if any, the bondholders have which are pertinent in considering the effect of the Fourteenth Amendment is not dealt with in the opinion.

It is essential also to consider possible further legislation which may be enacted if the Act of 1956 is determined to be valid. The importance of what may be done in the future under a statute challenged as unconstitutional has been stressed by the courts. (See *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U.S. 160, 169, 170; *Moore* v. *Otis*, 275 Fed. 747, 751 (C.C.A. 8).) This principle is applicable to the opportunities for other legislation inconsistent with assurances given the bondholders in the Act of 1948, with their rights under the Resolution and with their vested rights, if it is decided that the Act of 1956 is constitutional. This is a matter of present importance in view of the strong probability that new legislation will be the result of the investigation which is now being conducted by the Special Commission above referred to and its duty to report drafts of legislation to carry out any recommendations it may make (see Appendix E, p. 70).

The Act of 1956 is camouflaged, not only in its title but also in making it appear to have been enacted for the benefit of Woods Hole and the two islands as well as New Bedford. There is in fact no question as to present adequacy of service and facilities at Woods Hole and the islands. This is expressly admitted by the City of New Bedford in

paragraph 5 of its petition (R. 3) in this case, reading as follows:

> "That, while providing adequate transportation and appropriate facilities and accommodations for all other ports served by it, respondent Authority has remained adamant in its failure, refusal and neglect to provide similar appropriate facilities and accommodations for a ferry slip or transfer bridge in and at the port of the City of New Bedford."

The prayer of the petition for mandamus is limited to service at New Bedford (R. 4) and the order appealed from is limited to service and facilities at that point (R. 60, and Appendix F, p. 73).

That the Act of 1956 was enacted for the sole benefit of New Bedford and that Section 1 was recognized as causing injury to the islands is shown by Section 2 of the Act reducing the taxes to be levied on the islands in the event of deficiencies in earnings from 75 per cent of the amount to 50 per cent and transferring 25 per cent to New Bedford.

The long controversy between the islands and New Bedford over winter service at the latter port came before the Supreme Judicial Court, as has been stated above, in the two suits brought by that city and reported in 329 Mass. 243 and 330 Mass. 422, the suits being brought for declaratory decrees denying the power of the Authority to suspend such service.

In every year since the Authority acquired the steamship line in 1949 it has found it impossible to earn the cost of service, as pointed out above (p. 8). Winter losses are greatly increased by the loss resulting from transportation to and from New Bedford. This has made it particularly

desirable from the point of view of the islands as well as the bondholders to suspend service at that port during the winter months.

In the report of the first of the two cases just cited it appears (329 Mass. at p. 245) that on or about November 29, 1951, the Authority had voted to discontinue service at New Bedford from January 2 to April 26, 1952. This period had expired before the decision, and the court therefore declined to pass on the question of the power of the Authority in this respect, as it had become moot. The court held in this case, dealing with a controversy between the Department of Public Utilities and the Authority, that the Department had no jurisdiction to supervise and regulate transportation service furnished by the Authority, and no control whatever over the Authority except that it may disapprove any schedule of new rates, such disapproval having no retroactive effect under the statute. The court said (pp. 248-249):

> "The powers granted by the Legislature to the Authority as an agency of government are to be exercised free from the control of any other governmental agency unless these powers are made subject to such control by the statute creating the Authority or by some other general or special law.* The only restriction on the stated powers of the Authority is found in" the provision for the disapproval of new rates.

In the second case the question involved was as to whether the Authority could suspend service at New Bedford for the winter season of 1953-4. The island communities being vitally interested in a decision in favor of the

*Section 18 of the Act of 1948 reads: "All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act."

power of the Authority to take this step, Dukes County (which includes the island of Martha's Vineyard, of which Vineyard Haven is a port) and the Town of Nantucket (comprising the entire island of that name) intervened as parties defendant, the court holding (p. 424) that they were interested and proper parties because of the assessments to which they may become subject under Section 9 of the Act of 1948.

The long and thorough opinion in this case by former Chief Justice Qua discusses at length the terms of the statute, the population and characteristics of the islands and of New Bedford and Falmouth, and various facts stated in the report of a Commission on which the Act of 1948 is based (see pp. 428-430). The court held that, while the Act of 1948 contemplated that neither mainland port should be totally abandoned, there was no requirement that winter service be maintained at New Bedford.

In sustaining the power of the Authority to suspend service at New Bedford during the slack season for as long a period as from the last of September to the last of April, the court called attention (p. 430) to the fact that "steamboat service is vital to the economic survival of the islands at all seasons, but is not a matter of life or death to either Falmouth or New Bedford at any season."

The court went on to say that

> "the words and the tenor of the act make it plain that management of the project is to be vested in the authority";

and that this includes

> "power to adapt the service furnished to the amount of traffic offered. It includes proper consideration of costs, operating problems, including the necessity of laying up vessels for repairs, and other relevant fac-

tors, prominent among which are of course the two great peculiarities of this case, the unusual necessities of the islands and the seasonal character of the business. There is no requirement in the act of daily service or of any specified amount of service to any of the ports. All these are administrative matters to be determined by the authority and not by the courts." (P. 431.)

As to suspension of service to New Bedford during the winter months the court said:

"It would not necessarily be capricious, whimsical, or arbitrary. There may be persuasive reasons for it, within the scope of administrative discretion. The facts are not before us. For all we know winter business at New Bedford, which from the nature of the case must always have been small in comparison with summer business, may have declined still further. It may be conducted at a heavy loss and may throw a great burden of expense upon the islands without corresponding benefit to them and without great advantage to New Bedford. The extra thirty-two mile round trip across Buzzard's Bay may cast a great burden upon the vessels which may interfere with winter repairs or may reduce necessary service to the islands. If the judgments of reasonable men might differ, the question is one for the authority and not for us." (P. 432.)

The construction which the court thus placed on the Act of 1948 must be presumed to represent the intention of the legislature. It is obvious that the legislature meant to vest in the Authority the control of the details of the service

to be rendered by its steamers, without legislative interference with the rights expressly given to the purchasers of the bonds.

The power to suspend winter service at New Bedford is, of course, nullified by the Act of 1956, which asserts legislative control of the operations of the Authority and deprives it of its power "to adapt the service furnished to the amount of traffic offered," a power which, as the court said in 330 Mass. at p. 431, "any transportation enterprise must have."

The opinion of Ronan, J., in the case at bar gives scant attention to the elaborate arguments submitted to the court in behalf of the bondholders. The arguments on the three constitutional questions are really not indicated, and are cursorily disposed of in two successive paragraphs of the opinion, the first beginning with the words "It is manifest" (Appendix A, p. 42).

Earlier in the opinion Justice Ronan states (Appendix A, p. 42) that the Act of 1948 did not create a contract between the Commonwealth and the Authority, the latter being a governmental instrumentality like a municipal corporation, and authorities are cited in support of this. A straw man was thus set up and easily knocked down. Of course the respondents had not suggested that there was any such contract, but admitted there was none. The opinion does not discuss the question whether there was a contract between the Commonwealth and the bondholders, and there is actually no reference whatever to the contract between the Authority and the bondholders except in a single sentence, curiously enough thrown in extraneously at the end of the long paragraph summarizing the Act of 1948 and reading: "There is a provision in the contract between the bondholders and the Authority call-

ing for the use of surplus funds from time to time to redeem bonds" (Appendix A, p. 39).

The opinion admits that the Acts of 1956

> "altered the duty of the Authority in respect of the determination of whether to suspend service to and from New Bedford, seasonally. So far as this may mean that the annual deficit is increased over what it would be if the Authority retained a freer hand over the New Bedford service, this can mean that there will be less chance of there being a surplus of earnings which must be used to retire the bonds. * * * There may be other ways, as the respondents suggest, in which the total amount of assets on hand at any one time may be affected, with consequent effect on the total security of the bondholders, but we do not think that the contractual rights or vested interests of the bondholders have thereby been substantially impaired." (Appendix A, p. 42.)

This conclusion was reached without any further discussion as to what the contract rights or vested interests of the bondholders were or were claimed to be, nor was there any indication as to what the "other" factors were which the respondents claimed would have an "effect on the total security of the bondholders."

The reason for the conclusion of the court that the bondholders' rights are not "substantially" impaired by the Act of 1956 is stated as follows:

> "Payment of interest on and amortization of the bonds are included in the cost of service. Any deficiency of the reserve fund to meet such cost must be advanced by the Commonwealth and repaid by the taxing district to the Commonwealth. This is the real

security underlying the business operation which the bonds have financed. We do not think that the changes in security position which are caused by the 1956 statute materially affect the value of the bonds or the certainty of payment of principal or interest." (Appendix A, p. 43.)

There are, it is submitted, various answers to this line of reasoning:

1. There is no suggestion in the Act of 1948 that the provision of Section 9 for the payment by the Commonwealth to the Authority of deficiencies in annual earnings has the effect of rendering immaterial all of the obligations of the Commonwealth to the bondholders assumed in other parts of the Act or the obligations of the Authority to the bondholders, set out in the Resolution. On the contrary, Section 12 of the Act of 1948 (Appendix C, p. 59) expressly gives the bondholders the right to enforce "all" rights given them under the Act or by the Resolution, and the Resolution (Section 902, Appendix D, p. 69) contains similar provisions. There is not the slightest indication either in the Act or in the Resolution that this right of enforcement was of no consequence because of Section 9 of the Act, or that it was not believed to be an essential factor in making the bonds attractive to investors.

2. If the guaranty of payment of deficiencies be given full effect, and if the bondholders are assumed to be assured of payment of interest and, at maturity, the principal of the bonds, there are various other rights which are given to the bondholders by the Act of 1948 and the Resolution which are of value to them, notwithstanding such guaranty of interest and principal, as tending to sustain the current market value of the bonds. Such provisions are of interest to the holders of bonds, particularly those

which mature many years in the future. Such are the provisions of the Act of 1948 relieving the bondholders from all taxation in the Commonwealth on the bonds or the income therefrom (Section 7), those requiring the use of surplus funds at regular intervals for the purchase or redemption of bonds (Section 2 of the Act of 1949, Clause Fifth, Appendix C, p. 63), those providing for the eligibility of the bonds for investments by public boards, banks, etc., and for deposit with public officers (Section 11), and the provisions of Section 6 guaranteeing the bondholders against the diminution or impairment of the powers, duties or existence of the Authority, and against any competition except by very small boats.

And there are many provisions of the Resolution among those referred to above (pp. 12-14) which, if lived up to by the Authority, affect the market value of the bonds.

It is submitted that there is no justification for the statement of the Supreme Judicial Court (Appendix A, p. 43) that the market value of the bonds is not affected materially by the 1956 statute, particularly as it must be kept in mind that the question concerns, not merely the statute taken by itself, but new legislation which might follow the decision if that statute is constitutional.

3. If the Act of 1956, which admittedly impairs the powers and duties of the Authority, is held to be constitutional, it would follow that the legislature will have the power, not merely to impair in other ways these powers and duties, but also to terminate the existence of the Authority. It is, of course, extremely probable that, as a result of the report of the Special Commission above referred to (pp. 16-17, 18), new legislation will be adopted, and such legislation may well end the existence of the Authority. The interests of the island communities in escaping the losses which compliance with the Act of 1956 or other statutes based on the same theory would impose upon

them may well lead them to urge the recommendation of legislation terminating the existence of the Authority and establishing a new agency, either through private capital or through a new public board, for a new steamer line between the islands and the mainland excluding New Bedford entirely; or it may be that a separate steamer line for each island may be sought. If separate provision should thus be made for transportation to and from the islands, what would become of the guaranty in Section 9 of the Act of 1948, which covers only a deficiency in the earnings of the present Authority as reported by it? The thing now guaranteed would cease to exist, and there would be nothing to which it would be applicable.

4. There is, however, an additional fact which seems to be conclusive against the statements in the opinion (Appendix A, p. 43) that deficiencies in earnings must be advanced by the Commonwealth and that this is the real security underlying the bonds.

In reality the Commonwealth has not incurred any binding obligation whatever by the provision in Section 9 of the Act of 1948 that, if the reserve fund is insufficient to cover a deficiency of earnings in any year, "the Authority shall notify the state treasurer" and "the commonwealth shall thereupon pay over" the amount to the Authority. The bondholders are not referred to and the section no more imposes upon the Commonwealth an obligation to them than to any other creditors of the Authority whose claims relate to items included in the cost of service. If the section purported to impose a contractual obligation on the part of the Commonwealth to the Authority, all would agree that no binding contract would result. The section in fact does not in any respect speak the language of contract. It contains mandatory directions to the Authority and to the State Treasurer, and this whole portion of the section is revocable at any time without impairment

of any contract, and not only does not furnish "the real security underlying the business operation which the bonds have financed," but it furnishes *no* legal security to the bondholders or anybody else. A purchaser of bonds might well feel that the Commonwealth would continue to make the payments referred to, although he might be disappointed just as the passage of the Act of 1956 disappointed those bondholders who had relied on the promise of the Commonwealth that the powers and duties of the Authority should not be diminished or impaired.

The language of Section 9 dealing with this matter must be read in the light of Section 2 of the Act of 1948, which reads:

> "Section 2. *Credit of the Commonwealth not Pledged.*—Steamship bonds issued under the provisions of this act shall not be deemed to constitute a debt of the commonwealth, nor a pledge of the faith and credit of the commonwealth, but the bonds shall be payable solely from the funds herein provided therefor. All such bonds shall contain on the face thereof a statement to the effect that neither the Authority nor the commonwealth shall be obligated to pay the same, or the interest thereon except as herein provided, and that the faith and credit of the commonwealth are not pledged to the payment of the principal or of the interest on such bonds."

The Police Power.

After the Supreme Judicial Court had found that there was no substantial impairment of "the contractual rights or vested interests of the bondholders" (Appendix A, p. 43), it is hard to see why the police power was dragged into the case. It would have been different if the police

power had been invoked, notwithstanding an admitted impairment of contractual rights or vested interests. In the present case it is submitted that there is an impairment of the rights of the bondholders and that no requirement of public welfare appears which would justify a disregard of those rights.

The Act of 1956 does not indicate that it is based upon any "public need." The members of the public to be given consideration in any new legislation are the inhabitants of Martha's Vineyard and Nantucket, for whose benefit the Act of 1948 was passed. They opposed the Act of 1956 and their needs were wholly disregarded, the Act having been passed solely for the benefit of New Bedford.

It is approximately 46 miles by road around Buzzards Bay from New Bedford to Woods Hole, as any road map will show. While the distance traveled by the steamers across Buzzards Bay between these two ports is only 16 miles (330 Mass. at p. 428), it is obvious that passenger automobiles and freight trucks traveling by road would not require very much if any more time than would be taken by the steamer trip. There are no "vital public interests" or "fundamental interests"* which can form the basis for an impairment of the rights of the bondholders.

In the opinion Ronan, J., said (Appendix A, p. 43):

> "In view of the assurance against loss given in the provisions for reimbursement of deficits it is clear, we think, that the Commonwealth has not by the underlying statute of 1948 restricted its powers to act in the interest of the public to secure adequate transportation."

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*The quoted words were used by Chief Justice Hughes, with reference to the police power, in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, at pp. 439, 440, 443-444.

As pointed out above (p. 27), there is no such "assurance"; and thus the conclusion is left without any basis to support it.

The legislature did not and could not find that permanent winter operation at New Bedford, furnished by a particular kind of steamer, and the building of a ferry slip there were required by "the public need," nor that the Authority was failing to supply "adequate service for the purposes for which it was created," nor that there was any lack of "adequate and sufficient transportation," though winter service at New Bedford was not furnished.

The term "police power" is, of course, nothing but a characterization of the general legislative power when operating in a particular field. The restraints imposed by the Federal Constitution on the exercise of this general power by the states apply to so-called "police regulations" as much as to legislation of any other kind.

While this power may be exercised for the "general welfare," and when so exercised may in proper cases impair existing contracts or vested rights, the court has frequently called attention to the limitations imposed by the Constitution on such legislation.

Thus in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415, the court (Holmes, J.) said, after referring to the constitutional provisions against the taking of property for public use without compensation:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In *Nashville, Chattanooga & St. Louis Railway* v. *Walters,* 294 U.S. 405, involving the constitutionality of an order and an underlying statute providing for the elimination of a grade crossing and requiring the railway company to pay half the expense, Brandeis, J., said at p. 429:

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. * * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

Earlier in the opinion, at p. 415, it is stated:

"The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably." (Citing many earlier decisions.)

In *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56, 60, Cardozo, J. said:

"Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected."

In *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95, the opinion of Roberts, J., contains the following statement (pp. 108-109):

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end . . ."

Again, in *Wood* v. *Lovett,* 313 U.S. 362, 372, dealing with a case where a state had sold land under a tax title which was valid with the help of a statute curing irregularities in the tax proceeding, but invalid without it, and deciding that a repeal of the curative statute impairs the obligation of the contract between the state and its vendee, Roberts, J., concluded the opinion of the court as follows:

> "It begs the question to say that the State may not abdicate its police power. In the exercise of the policy committed to the legislature it is competent for the State to enter into a contract which it intends as an assurance of protection to its grantee. This we think the State has plainly done in the present instance."

See also a discussion of the matter by Chief Justice Hughes in *W. B. Worthen Co.* v. *Thomas* 292 U.S. 426, 433, and the statement of the court in *Treigle* v. *Acme Homestead Association,* 297 U.S. 189, 197.

As showing what is generally understood to be the limit to which the so-called police power is subject, reference should be made to a decision which was rendered by the Supreme Judicial Court of Maine shortly before the

case at bar was argued, but which did not appear in any of the current publications for a period of several months.

This case is *First National Bank of Boston* v. *Maine Turnpike Authority,* now reported in 153 Me. 128. It deals with a situation closely resembling that now presented, the question being whether the legislature, after pledging the revenues of a Turnpike Authority as security for the payment of its bonds, could constitutionally authorize the partial diversion of these revenues to the reimbursement of utility companies for the relocation of their facilities. The court held that the statute authorizing the diversion was invalid under the Federal Constitution as impairing the obligation of the contract under which the bonds were issued.

Conclusion.

It is submitted that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution.

Large numbers of people are interested in having the question of the constitutionality of the Act of 1956 definitively determined.

The inhabitants of the islands are up in arms about the matter of winter service at New Bedford. The fact that the statute reduces their share of the taxes by one-third is not of much concern to them in view of the great increase in the budgeted deficiency in earnings for 1957 as compared with the deficiency of any prior year (Ex. 1), and in view of the uncertainty as to what the situation will be in future years with respect to the amount of the deficiencies and the interference with winter service at the islands if compliance with the Act is required.

The holders of all of the outstanding bonds are interested because of the uncertainties as to the increase in the

operating expenses of the Authority in future years if the Act of 1956 must be complied with, and in particular because of the various kinds of legislation which may result if the Act is determined to be constitutional.

The members of the Special Commission now investigating the Authority, and the members of the legislature themselves, should be interested in knowing whether the legislature can interfere with the powers, duties and existence of the Authority or with other rights apparently conferred upon the bondholders by the Act of 1948, the Resolution or the principles of law concerning vested rights.

There is a further consideration which is of much importance to the appellants. They are anxious to have the question ultimately determined by a court whose members are not in any way affected by a prior opinion publicly expressed by them and acted upon by the public officials to whom the opinion was given.

In the state courts the appellants went into the present litigation with the scales weighted against them, for the reason that all of the five justices of the Supreme Judicial Court who sat in the present case were among the six justices who joined in the opinion to the Governor and Council reported in 334 Mass. 765. The bill which became the Act of 1956 was signed by the Governor on October 11, 1956 (334 Mass. at p. 767), and two weeks later the Governor and Council requested the opinion of the justices, stating that "grave doubts as to the constitutionality of c. 747 involve the duty of the Governor and Council to approve any warrant for payment by the Commonwealth" of the deficiency in the operations of the Authority in the year 1956, the proportions of the assessments having been changed by Section 2 of the Act. The material question put to the Justices was question 3 quoted above (p. 6).

The Constitution of Massachusetts, like those of several other states, provides (Part II, C. III, Art. II) that "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon questions of law, and upon solemn occasions."

In Massachusetts, as in all the other states in which provisions like this exist, it is conceded, not only that such an opinion does not constitute res judicata in subsequent litigation, but that the members of the court, if called upon to rule upon an issue thus arising, should consider the matter de novo and disabuse their minds of impressions received in the ex parte formulation of the advisory opinion. If the court is at all realistic, however, it is recognized that such erasures of conclusions once reached, however desirable, are psychologically impossible, and this has more than once been referred to as the reason for giving a narrow scope to the constitutional requirement.

In an *Answer of the Justices,* 148 Mass. 623, it was said, at p. 625:

> "Although such an opinion has not the force of an adjudication, yet it is, in a sense, a pre-judgment of the question proposed, and would usually be followed by the subordinate judicial officers of the Commonwealth; and any inhabitant interested in the question might well feel that his rights had been impaired by it without giving him an opportunity to be heard."

And in dealing with the corresponding provision in the Maine Constitution a majority of the Justices of the Supreme Court of that state gave the following as a ground for declining to answer a question not clearly arising upon a "solemn occasion" (*Opinions of the Justices,* 95 Me. 564, at pp. 565-566):

> "An opinion given in answer to questions thus propounded, without notice, hearing or argument, although it has not the binding force of a judgment of the court, is certainly prejudicial to the interests of those to whom it is adverse."

In the present case, involving action to be taken by the Governor and Council which could properly be taken only if the Act of 1956 was constitutional, it would seem to be humanly impossible that in subsequent litigation the Justices should not convince themselves that they had been right in an opinion which they had given. It may be pointed out that in every one of the many cases in which the Supreme Judicial Court has been called upon to determine questions previously answered in an advisory opinion, the result has been the same as that indicated in the opinion. Indeed, there appears only one such case—*Loring* v. *Young*, 239 Mass. 349—in which even a minority of the court have departed from the advisory opinion.

In *Lincoln* v. *Secretary of the Commonwealth*, 326 Mass. 313, the court, with all seven justices participating, decided a certain issue, with three justices dissenting. A few weeks before the argument of the case the same issue had been submitted by the State Senate to the same justices for an opinion, reported in 326 Mass. 781, and had been answered by four of them, with three dissenting, the majority and the minority being composed of the same individual justices as in the later litigated case.

The Supreme Court of the United States is thus the only tribunal in which the appellants in the present case can stand on an equal footing with the appellees. This is surely a strong reason for entertaining the appeal.

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APPENDIX A.

March 14, 1958.—The opinion printed in Mass. Adv. Sh. (1958) 107-112 has been cancelled and the following opinion has been substituted.

MASS. ADVANCE SHEETS (1958) 489; 148 N.E. 2D 637.

CITY OF NEW BEDFORD *vs.* NEW BEDFORD, WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY & others.

Bristol. December 3, 1957.—January 15, 1958.

Present: RONAN, SPALDING, WILLIAMS, COUNIHAN & WHITTEMORE, JJ.

New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. Constitutional Law, Obligation of contracts, Due process of law, Opinions of the Justices, Police power. *Mandamus.*

Case heard in the Superior Court by *Nagle, J.*

RONAN, J. These are exceptions taken by the respondents comprising a public board created by St. 1948, c. 544, and known as New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, three of its individual members, and three intervening banks who are owners of bonds issued by the board, to an order for judgment entered upon this petition for a writ of mandamus commanding the board and its five individual members "to comply with the provisions of c. 747 of the Statutes of 1956 by taking such steps as may be reasonable and necessary to carry out the intent and purposes of the legislative mandate," and to the denial of requests for rulings. There is another bill of exceptions filed by one Backus, a member of the board, who, with two fellow members included in the petition already mentioned, voted not to carry out the provisions of said c. 747. The questions presented by both

bills of exceptions arose from the said vote of the board and will be considered together.

A brief summary of the provisions of St. 1948, c. 544, in so far as they pertain to the questions now presented, will show its purpose and the method adopted to accomplish it. By § 1 the Authority was created "to provide adequate transportation of persons and necessaries of life for the islands of Nantucket and Martha's Vineyard," and was "empowered to purchase, construct, maintain and operate necessary vessels, docks, wharves . . . and to issue its revenue bonds payable solely from revenues, or funds as hereinafter authorized in section nine of this act." Section 2 provides, "Steamship bonds issued under the provisions of this act shall not be deemed to constitute a debt of the commonwealth, nor a pledge of the faith and credit of the commonwealth, but the bonds shall be payable solely from the funds herein provided therefor. All such bonds shall contain on the face thereof a statement to the effect that neither the Authority nor the commonwealth shall be obligated to pay the same, or the interest thereon *except as herein provided* [emphasis supplied], and that the faith and credit of the commonwealth are not pledged to the payment of the principal or of the interest on such bonds." Section 3 provides for the appointment and removal of the members of the Authority, § 4 supplies definitions, § 5 enumerates the general powers conferred on the Authority and defines "cost of the service" to include "interest and amortization . . . on bonds or notes of the Authority issued under this act," and § 6 provides for the issuance of steamship bonds and empowers the Authority to designate their form and the signatures on their faces and the use of their proceeds. It is this last provision that contains the statement upon which the interveners rely and which reads as follows: "While any bonds issued by the Authority remain outstanding, the powers, duties or exis-

tence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds." Section 6 also provides against competition by another steamship line, while § 7 provides for an exemption from taxation. Section 8 provides for the building up of a reserve fund for the payment of interest and redemption of the bonds. Section 9 provides that when income is insufficient to meet "the cost of the service" the reserve fund shall be used to make up the deficiency and if the reserve fund at the end of any year is insufficient therefor the Treasurer of the Commonwealth shall pay over to the Authority the amount of the deficiency less the amount in the reserve fund. In turn the Commonwealth is to be reimbursed for such payment in certain proportions by the county, city and towns benefited by the operation of the steamship line. Section 16 states that the act, being necessary for the welfare of the Commonwealth, should "be liberally construed to effect the purposes thereof," and by § 18 all inconsistent general and special laws shall be deemed inapplicable. There is a provision in the contract between the bondholders and the Authority calling for the use of surplus funds from time to time to redeem bonds.

The interveners are three banks owning $643,000 of the bonds of the Authority, all issued prior to the enactment of St. 1956, c. 747. An issue in 1949 which amounted to $4,100,000 was used to acquire the property of an existing steamship line, to improve the same, and to maintain the newly acquired property. A second issue of $2,000,000 was made in 1955 to enable the Authority to pay for the construction of a new ferry type vessel which was ordered in that year. A third issue of $250,000 was made in 1957 to complete the new vessel, and $100,000 has been made available, if necessary, to make a ferry slip at New Bedford for the use of the new vessel when it should arrive

and be put in service. Nearly the total amount of these bonds is outstanding.

It appeared in evidence that the budget of the Authority for 1957 shows an anticipated deficit of $340,000 and that the reserve fund of $200,000 provided for in St. 1948, c. 544, has been exhausted. The actual cost figures of the Authority for 1956 show a deficit in cost of service in that year of $111,918.33 and a deficit in every year of operation except the first, 1949.

The respondents in the first bill of exceptions stated exceptions to the failure of the judge to give three requested rulings which were as follows: "4. The provisions of St. 1948, c. 544, inserted for the protection of the future buyers of the bonds and to facilitate the sale of the bonds at low rates of interest and the accomplishment of the purposes of the Commonwealth, constitute a contract between the Commonwealth and the bondholders, the obligation of which cannot be impaired by legislation. 5. Statute 1956, c. 747, is invalid under § 10 of art. 1 of the United States Constitution. 6. Statute 1956, c. 747, is invalid under both the Federal and the Massachusetts Constitutions as taking property of the bondholders without compensation in that it defeats or substantially impairs rights vested in the bondholders under St. 1948, c. 544."

The respondents contend that § 6 of the 1948 act, providing that "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds," forbids the enactment of St. 1956, c. 747. They contend that the bondholders are so affected by this statute, which so far as material reads as follows: "The Authority shall provide adequate transportation of persons and necessaries of life for the islands of Nantucket and Martha's Vineyard throughout the year, and shall

provide regularly scheduled ferry runs daily throughout the year of the type that will accommodate standard size trucks and semi tractor-trailer vehicles to and from the ports of New Bedford, Woods Hole, Vineyard Haven, and Nantucket, and adequate ferry slips or transfer bridges shall be constructed and maintained at said ports to facilitate and accommodate said vehicular traffic."

The parties direct attention to *Opinion of the Justices*, 334 Mass. 765, where it was stated that St. 1956, c. 747, changing the powers and duties of the Authority by requiring the daily operation of the steamship, was not an unconstitutional impairment of the contract represented by the bonds which had previously been issued under St. 1948, c. 544. Such opinions are given by members of this court in performance of a duty imposed upon them as individual advisers by the Constitution, Part II, c. 3, art. 2. They are not precedents binding upon the court and do not come within the doctrine of stare decisis. We consider the same question anew when it arises in subsequent litigation unaffected by the previous opinion. *Commonwealth* v. *Welosky*, 276 Mass. 398. *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 245. *Lincoln* v. *Secretary of the Commonwealth*, 326 Mass. 313.

The respondents point out that the opinion in 334 Mass. 765 was qualified by reference to the prior *Opinion of the Justices*, 334 Mass. 721, in respect of the Massachusetts Port Authority, where we said in effect that the power of revocation and amendment in respect of the charter of a public corporation having aspects of a municipal corporation was not unlimited, that property cannot be taken without compensation or due process of law, and that the statute creating the Port Authority would be subject to revocation and amendment which "would not defeat or substantially impair without compensation rights vested under the statute" (page 738). We deal below with the

respondents' contentions that contractual rights have been impaired and property taken without due process by the 1956 statute.

The Authority was a purely public corporation and not designed for profit, and was created as a governmental instrumentality to accomplish a public undertaking. The act of 1948 did not create a contract between the Commonwealth and the Authority but created a relationship more nearly like that existing between the Commonwealth and a municipal corporation an impairment of which would not be violative of the contract clause, art. 1, § 10, of the Federal Constitution. See *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Broadhurst* v. *Fall River,* 278 Mass. 167; *Commonwealth* v. *Hudson,* 315 Mass. 335; *Mayor of Gloucester* v. *City Clerk of Gloucester,* 327 Mass. 460.

Prior to the enactment of St. 1956, c. 747, it was decided that whether the Authority was required to operate the steamship line during the winter months rested with the Authority and was a mere administrative detail, and that we could not interfere in the absence of a showing that the action of the Authority was capricious, whimsical or arbitrary. *New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 330 Mass. 422. It was apparently as a result of this decision that the operation of the line to and from New Bedford was suspended during the winter of 1955-1956.

It is manifest that the 1956 statute altered the duty of the Authority in respect of the determination of whether to suspend service to and from New Bedford, seasonally. So far as this may mean that the annual deficit is increased over what it would be if the Authority retained a freer hand over the New Bedford service, this can mean that there will be less chance of there being a surplus of earnings which can be used to retire the bonds. There is therefore the possibility that some bonds which would otherwise

be retired in advance of the due date will not be paid off until that date. There may be other ways, as the respondents suggest, in which the total of assets on hand at any one time will be affected, with consequent effect on the total security of the bondholders. But we do not think that the contractual rights or vested interests of the bondholders have thereby been substantially impaired. Payment of interest on and amortization of the bonds are included in the cost of service. Any deficiency of the reserve fund to meet such cost must be advanced by the Commonwealth and repaid by the taxing district to the Commonwealth. This is the real security underlying the business operation which the bonds have financed. We do not think that the changes in security position which are caused by the 1956 statute materially affect the value of the bonds or the certainty of payment of principal or interest.

We think that the power of the Legislature was not restricted in respect of changing the powers and duties of the Authority by requiring winter operation and the building of a ferry slip if the public need required such change. The hand of the Legislature was not stayed if it was found that the Authority was failing to supply adequate service. In view of the assurance against loss given in the provisions for reimbursement of deficits it is clear, we think, that the Commonwealth has not by the underlying statute of 1948 restricted its powers to act in the interest of the public to secure adequate transportation. The bonds, in the circumstances, were held subject to the possible exercise of this police power and there is no absence of due process in its exercise here. For cases on the police power generally see *Opinion of the Justices*, 334 Mass. 721; *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.* 323 Mass. 282,[1] 289-294; *Opinion of the Justices*, 293 Mass. 589, 600-601;

[1] Appeal dismissed sub nomine *Boston Railroad Holding Co.* v. *Delaware & Hudson Co.* 336 U. S. 932.

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398, 424-438; *Veix* v. *Sixth Ward Building & Loan Association of Newark,* 310 U. S. 32, 37-38. Compare *Opinion of the Justices,* 300 Mass. 607; *Boston Elevated Railway* v. *Commonwealth,* 310 Mass. 528, 549.

There was no error in the refusal to give the requests for rulings of the Authority and the bondholders.

There was no error in denying the three requests of Backus for rulings that the writ should not issue while bills were pending on similar matters in the Legislature, or because c. 747, the basis of the instant proceeding, is too vague, or because the Superior Court would be warranted in its discretion to refuse to issue the writ. Chapter 747 was couched in definite terms, mandatory in its object, specific as to the means by which it was to be attained and leaving little, if anything, to the judgment of the Authority. *Massachusetts Society of Graduate Physical Therapists, Inc.* v. *Board of Registration in Medicine,* 330 Mass. 601, 605-606.

The scope of the order for judgment which was in general to comply with St. 1956, c. 747, was too broad. Only two specific subjects were before the court, that is, winter service and the construction of a ferry slip. The order should be reframed and confined to these two particular matters and as so moulded should be affirmed.

Exceptions overruled.

Robert G. Dodge, (*Harold S. Davis & Herbert P. Wilkins* with him,) for the respondents New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority and others.

George M. Poland, (*Ella M. Dolan* with him,) for the respondent Backus.

William B. Perry, Jr., Assistant City Solicitor, (*Bernard Kestenbaum,* Assistant City Solicitor, with him,) for the petitioner.

APPENDIX B.

MASSACHUSETTS ACTS OF 1956, CHAPTER 747.

AN ACT RELATIVE TO ASSESSMENTS UPON CITIES AND TOWNS SERVED BY THE NEW BEDFORD, WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY IN THE EVENT OF A DEFICIT IN THE COST OF SERVICE OF SAID AUTHORITY, AND PROVIDING FOR CONTINUOUS SERVICE THROUGHOUT THE YEAR.

Be it enacted, etc., as follows:

SECTION 1. Chapter 544 of the acts of 1948 is hereby amended by inserting after section 5 the following section:—*Section 5A.* The Authority shall provide adequate transportation of persons and necessaries of life for the islands of Nantucket and Martha's Vineyard throughout the year, and shall provide regularly scheduled ferry runs daily throughout the year of the type that will accommodate standard size trucks and semi tractor-trailer vehicles to and from the ports of New Bedford, Woods Hole, Vineyard Haven, and Nantucket, and adequate ferry slips or transfer bridges shall be constructed and maintained at said ports to facilitate and accommodate said vehicular traffic.

SECTION 2. Section 9 of said chapter 544 is hereby amended by striking out the next to the last paragraph and inserting in place thereof the following paragraph:—

In case the commonwealth shall be called upon to pay the Authority any amount under this section, such amount with interest or other charges incurred in borrowing the money for the purpose, except such amounts as may be appropriated by the general court therefor, shall be assessed on the city of New Bedford and the towns of Falmouth and Nantucket and the county of Dukes county, in the following proportions, viz.: forty per cent on the city

of New Bedford; ten per cent on the town of Falmouth; twenty per cent on the town of Nantucket; and thirty per cent on the county of Dukes county. The county commissioners of the county of Dukes county shall allocate such assessment upon said county to be paid severally by the towns in said county, excepting the town of Gosnold, in the same proportions as in the assessment of the county tax.

Approved October 11, 1956.

APPENDIX C.

MASSACHUSETTS ACTS OF 1948, CHAPTER 544, AND ACTS OF 1949, CHAPTER 142.

The Act of 1948, Chapter 544.

AN ACT PROVIDING FOR THE ACQUISITION, MAINTENANCE AND OPERATION OF THE STEAMSHIP LINE OPERATING BETWEEN NEW BEDFORD, FALMOUTH AND THE ISLANDS OF NANTUCKET AND MARTHA'S VINEYARD, PROVIDING FOR THE CREATION OF THE NEW BEDFORD, WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY AND DEFINING ITS POWERS AND DUTIES AND PROVIDING FOR THE FINANCING OF SAID PROJECT.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide without delay adequate transportation facilities between New Bedford, Falmouth and the islands of Martha's Vineyard and Nantucket, without cost to the commonwealth, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted, etc., as follows:

Section 1. *The New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Lines.*—In order to provide adequate transportation of persons and necessaries of life for the islands of Nantucket and Martha's Vineyard, the Authority hereinafter created is hereby authorized and empowered to purchase, construct, maintain and operate necessary vessels, docks, wharves, other vessels, equipment, furniture and supplies and to issue its revenue bonds payable solely from revenues, or funds as hereinafter authorized in section nine of this act.

Section 2. *Credit of the Commonwealth not Pledged.*—Steamship bonds issued under the provisions of this act

shall not be deemed to constitute a debt of the commonwealth, nor a pledge of the faith and credit of the commonwealth, but the bonds shall be payable solely from the funds herein provided therefor. All such bonds shall contain on the face thereof a statement to the effect that neither the Authority nor the commonwealth shall be obligated to pay the same, or the interest thereon except as herein provided, and that the faith and credit of the commonwealth are not pledged to the payment of the principal or of the interest on such bonds.

SECTION 3. *The New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.*—There is hereby created a body corporate to be known as the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, which shall be deemed to be a public instrumentality for the purpose of this act, and by that name the Authority may sue and be sued, plead and be impleaded, contract and be contracted with, and shall have an official seal and may alter the same at pleasure.

The New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority shall consist of five members, who shall be appointed by the governor, by and with the advice and consent of the council. Five members shall be residents of the commonwealth and shall include one resident of Nantucket, one resident of Martha's Vineyard, one resident of New Bedford and one resident of Falmouth. The fifth member shall be designated as chairman of the Authority, and his term of office shall be eight years. The four resident members of the Authority first appointed shall continue in office for terms expiring on July first, nineteen hundred and fifty-six, July first, nineteen hundred and fifty-four, July first, nineteen hundred and fifty-two and July first, nineteen hundred and fifty, respectively, the term of each member to be designated by the governor and continue until his respective successor shall be duly ap-

pointed and qualified. The successor of each member shall be appointed for a term of eight years, except that any person appointed to fill a vacancy shall be appointed to serve only for the unexpired term. Any member of the Authority shall be eligible for reappointment. Each member of the Authority may be removed by the governor, with the advice and consent of the council, for misfeasance, malfeasance or wilful neglect of duty, but only after reasonable notice and a public hearing unless the same are in writing expressly waived. Each appointed member of the Authority, before entering upon his duties, shall take an oath before the governor to administer the duties of his office faithfully and impartially, and a record of such oaths shall be filed in the office of the state secretary.

The Authority shall elect one of the members as vice-chairman and as secretary, and shall also elect a treasurer who need not be a member of the Authority. Three members of the Authority shall constitute a quorum, and the vote of three members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the Authority. Before the issuance of any steamship bonds under the provisions of this act, each member of the Authority shall execute a surety bond to the commonwealth, with a surety company authorized to transact business in this commonwealth as surety in the penal sum of ten thousand dollars, and the treasurer shall execute such a bond in the penal sum of twenty thousand dollars conditioned upon the faithful performance of the duties of his office. Each such surety bond will be approved by the attorney general and filed in the office of the state secretary. The members of the Authority shall serve without compensation. Each member shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties. All ex-

penses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act, and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under authority of this act.

SECTION 4. *Definitions.*—As used in this act, the following words and terms shall have the following meanings unless the context shall indicate another or different meaning or intent:—

(*a*) The word "Authority" shall mean the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority created by section three of this act, or if said Authority shall be abolished, the board, body or commission succeeding to the principal functions thereof, or to whom the powers given by this act to the Authority shall be given by law.

(*b*) The words "steamship line" shall mean the existing vessels, real and personal estate and shall embrace all property rights, easements and interests acquired by the Authority for the operation of the steamship line.

(*c*) The term "cost of the project" shall embrace the cost of the acquisition of the steamship line operated by the Massachusetts Steamship Lines, Incorporated, and shall include all of the land, property rights, easements and interests acquired by the Authority, the cost of all vessels, machinery and equipment, financing charges, interest charges, cost of traffic estimates and of engineering and legal expenses, plans, surveys, estimate of costs and revenues and other expenses necessary or incident to the acquisition of the steamship line, administrative expense and such other expenses as may be necessary or incident for the project and financing and acquisition costs of the project.

SECTION 5. *General Grant of Powers.*—The Authority is hereby authorized and empowered—

(*a*) To acquire, maintain, repair and operate the project.

(*b*) To issue bonds of the Authority payable solely from the funds herein provided for such payment for the purpose of paying all or any part of the cost of the project, and for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service, the total amount not to exceed six million dollars.

(*c*) To fix, from time to time, such rates of fare and charges for service furnished or operated as in the judgment of its members are best adapted to insure sufficient income to meet the cost of the service, as hereinafter defined. Rates so fixed shall be and remain in effect until changed by the Authority unless the department of public utilities shall upon petition and after a public hearing disapprove them. Such disapproval, if any, shall not be retroactive in effect.

The cost of the service shall include (1) operating expenses, (2) taxes, (3) rentals, (4) interest on all indebtedness of said corporation, if any, (including amortization of discount or premium) assumed by the Authority and still outstanding, (5) interest and amortization (including amortization of discount or premium) on bonds or notes of the Authority issued under this act, (6) such allowance as the Authority may deem necessary or advisable for depreciation of property and for obsolescence and losses in respect to property sold, destroyed or abandoned, (7) salaries and wages of all officers and employees appointed or employed by or subject to the supervision of the Authority, and, to the extent authorized by the Authority, pensions and retirement allowances, if any, to present and former employees of said corporation and employees of the Authority, (8) all other expenditures and charges which are properly chargeable against income or surplus.

(*d*) To adopt by-laws for the regulation of its affairs and the conduct of its business.

(*e*) To acquire, hold and dispose of real and personal property, including additional vessels and fixtures, for its corporate purposes.

(*f*) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ consulting engineers, superintendents, managers, accounting experts, attorneys and such other employees and agents as may be necessary in its judgment, and to fix their compensation, provided that all such expenses shall be solely from the proceeds of bonds issued under the provisions of this act or from the revenues of the operation of the steamship line.

(*g*) To receive and accept from any federal agency grants for or in aid of the acquisition or operation of the project, and to receive and to accept contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made; and to do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

(*h*) To employ, in so far as may be practicable the regular employees of the Massachusetts Steamship Lines, Incorporated, and to recognize such seniority and pension benefits as the said employees currently enjoy under any health, sickness or retirement program.

SECTION 6. *Steamship Bonds.*—The Authority is hereby authorized to provide by resolution at one time or from time to time for the issuance of bonds of the Authority for the purpose of paying all or any part of the cost of the project and for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service. The principal and interest of such

bonds shall be payable solely from the funds herein provided for such payment. The bonds of each issue shall be dated, shall bear interest at such rates not exceeding four and a half per centum per annum, shall mature at such time or times not exceeding forty years from their date or dates as may be determined by the Authority, and may be made redeemable before maturity at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and the manner of execution of the bonds, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within the commonwealth. In case any officer whose signature or facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes, the same as if he had remained in office until such delivery. All bonds issued under the provisions of this act shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the commonwealth. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone, and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The Authority may sell such bonds in such manner, either at public or at private sale, and for such price, as it may determine to be for the best interests of the Authority, but no such sale shall be made at a price so low as to require the payment of interest on

the money received therefor at more than four and a half per centum per annum, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, excluding, however, from such computation the amount of any premium to be paid on redemption of any bonds prior to maturity.

The proceeds of such bonds shall be used solely for the payment of the cost of the project, and for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide. If the proceeds of such bonds, by error of estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficit, and, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement hereinafter mentioned, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued. If the proceeds of the bonds shall exceed the cost of the project, the surplus shall be used for the retirement of such bonds. Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. Bonds may be issued under the provisions of this act without obtaining the consent of any department, division, commission, board, bureau or agency of the commonwealth, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this act.

The Authority is hereby authorized to provide by resolution for the issuance of refunding bonds of the Authority for the purpose of refunding any bonds that are outstanding and issued under the provisions of this act, including payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if deemed advisable by the Authority, for the additional purpose of purchasing additional vessels or equipment. The issuance of such bonds, the maturities and other details thereof, and the duties of the Authority in respect to the same, shall be governed by the provisions of this act in so far as the same may be applicable.

While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds.

While any bonds issued by the Authority remain unpaid, no person shall operate a vessel of more than one hundred tons gross tonnage to carry by water passengers or freight between the mainland of the commonwealth and the islands of Martha's Vineyard and Nantucket, and the Authority shall be entitled to receive injunctive relief against such operation.

SECTION 7. *Exemption from Taxation.*—The exercise of the powers granted by this act will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of the steamship line by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon the project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom, and the

bonds and refunding bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation within the commonwealth.

SECTION 7A. Section 12 of chapter 63 of the General Laws is hereby amended by inserting after paragraph (*h*) the following:—

(*i*) Bonds issued by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.

SECTION 8. *Trust Agreement.*—In the discretion of the Authority such bonds or refunding bonds shall be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within the commonwealth. Such trust agreement may pledge or assign the revenues to be received, but shall not convey or mortgage the vessels, equipment or property. Either the resolution providing for the issuance of bonds or such trust agreement may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition, improvement, maintenance, operation, repair and insurance of the project, and the custody, safeguarding and application of all moneys.

It shall be lawful for any bank or trust company incorporated under the laws of the commonwealth to act as depository of the proceeds of bonds or of revenues and to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Such trust agreement may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders as is customary in trust agreement or trust indentures securing bonds and debentures of corporations. In addition to the foregoing,

such trust agreement may contain such other provisions, including a provision for a sinking fund, as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement may be treated as a part of the cost of the operation of the project.

SECTION 9. *Revenues.*—[The first paragraph of this section is not printed here, as a substitute appears in Section 2 of Chapter 142 of the Acts of 1949, printed below.]

Whenever the income of the Authority is insufficient to meet the cost of the service, as defined in section five, the reserve fund shall be used as far as necessary to make up said deficiency.

If as of the last day of December in any year the amount remaining in the reserve fund shall be insufficient to meet the deficiency hereinbefore referred to, the Authority shall notify the state treasurer of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the Authority the amount so ascertained and the Authority shall apply the amount so received from the commonwealth in payment of such deficiency. Pending such payment, the Authority shall borrow such amount of money as may be necessary to enable it to make all payments as they become due.

If as of the last day of December in any year the reserve fund shall exceed the amount originally established, the Authority shall apply any excess so far as necessary to reimbursing the commonwealth for any amounts which it may have paid to the Authority under the provisions hereof and the commonwealth shall thereupon distribute the amounts so received among the cities and towns constituting the Authority in proportion to the amounts which they have respectively been assessed as hereinafter provided.

In order to meet any payment required of the commonwealth under this section, the state treasurer may borrow at any time, in anticipation of the assessments to be levied upon the cities and towns hereinafter specified, such sums of money as may be necessary to make said payments and he shall repay any sums so borrowed as soon after said assessments are paid as is expedient.

In case the commonwealth shall be called upon to pay the Authority any amount under this section, such amount with interest or other charges incurred in borrowing the money for the purpose, except such amounts as may be appropriated by the general court therefor, shall be assessed on the city of New Bedford and the towns of Falmouth and Nantucket and the county of Dukes County, in the following proportions, viz.: fifteen per cent on the city of New Bedford; ten per cent on the town of Falmouth; twenty-five per cent on the town of Nantucket; and fifty per cent on the county of Dukes County. The county commissioners of the county of Dukes County shall allocate said assessment upon said county to be paid severally by the towns in said county, excepting the town of Gosnold, in the same proportions as in the assessment of the county tax.

If at any time the Authority has not sufficient cash to make the payments required in the course of its management and operation of the steamship line and other properties under its control, the Authority may temporarily borrow money and issue notes of the Authority therefor.

Section 10. *Trust Funds.*—All moneys received pursuant to the authority of this act, whether as proceeds from the sale of bonds or as revenues, shall be deemed to be trust funds, to be held and applied solely as provided in this act. The Authority shall, in the resolution authorizing the issuance of bonds or in the trust agreement, provide for the payment of the proceeds of the sale of such

bonds, and all revenues to be received, to any officer who, or to any agency, bank or trust company which, shall act as trustee of such funds and shall hold and apply the same to the purposes hereof, subject to such regulations as this act and such resolution or trust agreement may provide.

SECTION 11. *Bonds Eligible for Investment.*—Bonds and refunding bonds issued under the provisions of this act are hereby made securities in which all public officers and public bodies of the commonwealth and its political subdivisions, all insurance companies, trust companies in their commercial departments and within the limits set by section forty of chapter one hundred and seventy-two of the General Laws, banking associations, investment companies, executors, trustees and other fiduciaries, and all other persons whatsoever who are now or may hereafter be authorized to invest in bonds or other obligations of a similar nature may properly and legally invest funds, including capital in their control or belonging to them, and such bonds are hereby made obligations which may properly and legally be made eligible for the investment of savings deposits and the income thereof in the manner provided by subdivision (*c*) of clause Fifteenth of section fifty-four of chapter one hundred and sixty-eight of the General Laws. Such revenue bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the commonwealth for any purpose for which the deposit of bonds or other obligations of the commonwealth now or may hereafter be authorized by law.

SECTION 12. *Remedies.*—Any holder of bonds or refunding bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under the trust agreement, if any, except to the extent the rights herein given may be restricted by such resolution or trust agreement, may, either at law or in equity, by suit, action,

mandamus or other proceeding, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such resolution or trust agreement, and may enforce and compel the performance of all duties required by this act or by such resolution or trust agreement to be performed by the Authority or by any officer thereof, including the fixing, charging and collecting of tolls and charges for the use of the project.

SECTION 13. [A new Section 13 is contained in Section 4 of Chapter 142 of the Acts of 1949.]

SECTION 14. *Report.*—On or before the thirtieth day of January in each year, the Authority shall make an annual report of its activities for the preceding calendar year to the governor and to the general court. Each such report shall set forth a complete operating and financial statement covering its operations during the year. The Authority shall cause an audit of its books to be made at least once in each year by the state auditor, and the cost thereof may be treated as part of the operation of the project. Such audits shall be deemed to be public records within the meaning of chapter sixty-six of the General Laws.

Any member, agent or employee of the Authority who contracts with the Authority or is interested, either directly or indirectly in any contract with the Authority, other than a contract relating to labor or wages, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year or both.

SECTION 15. *Appropriation.*—To provide for the preliminary expenses of the Authority in carrying out the provisions of this act, there may be expended such sums, not exceeding fifty thousand dollars, as may be appropriated therefor from the general fund or revenue of the commonwealth, which sum shall be paid to the Authority, and any sum so paid shall be reimbursed by the Authority

to the commonwealth out of the proceeds of any revenue bonds which may be issued under the provisions of this act.

SECTION 16. *Act Liberally Construed.*—This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed to effect the purposes thereof.

SECTION 17. *Constitutional Construction.*—The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 18. *Inconsistent Laws Inapplicable.*—All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act. *Approved June 11, 1948.*

THE ACT OF 1949, CHAPTER 142.

AN ACT PROVIDING FOR THE ACQUISITION, MAINTENANCE AND OPERATION OF THE STEAMSHIP LINE OPERATING BETWEEN NEW BEDFORD, FALMOUTH AND THE ISLANDS OF NANTUCKET AND MARTHA'S VINEYARD, AND PROVIDING FOR THE FINANCING THEREOF.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide without delay adequate transportation facilities between New Bedford, Falmouth and the islands of Martha's Vineyard and Nantucket, without cost to the commonwealth, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted, etc., as follows:

SECTION 1. Subdivision (*b*) of section 5 of chapter 544 of the acts of 1948 is hereby amended by inserting after the

word "amount", in line 6, the words:—to be outstanding at any one time, including refunding bonds but excluding the bonds to be refunded thereby,—so as to read as follows:—(*b*) To issue bonds of the Authority payable solely from the funds herein provided for such payment for the purpose of paying all or any part of the cost of the project, and for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service, the total amount to be outstanding at any one time, including refunding bonds but excluding the bonds to be refunded thereby, not to exceed six million dollars.

SECTION 2. Section 9 of said chapter 544 is hereby amended by striking out the first paragraph and inserting in place thereof the following:—The revenues derived from the operation of the steamship line shall be set aside at regular intervals in the following order, in the following amounts and for the following purposes, all as may be provided in the resolution authorizing the issuance of the bonds:

First: to an operations fund, an amount sufficient to pay the cost of maintenance, repair and operation of the steamship line and to maintain working capital for such purposes, in the amount hereinafter established;

Second: to the sinking fund, an amount sufficient to provide for the payment of the interest on and for the amortization and payment of the principal of all bonds as the same shall become due and payable;

Third: to a replacement fund, if so provided in such resolution, such amount, if any, as the Authority may deem necessary or advisable for depreciation of property and for obsolescence and losses in respect to property sold, destroyed or abandoned;

Fourth: to the reserve fund hereinafter established, an amount sufficient to maintain said fund at the amount originally established as hereinafter provided and thereafter

to make any reimbursement as hereinafter provided for any moneys which shall have been paid by the commonwealth under this section; and

Fifth: to the sinking fund, all of the remaining revenues, to be used within a reasonable time for the purchase or redemption of bonds.

There shall be set aside from the proceeds of the bonds initially issued under the provisions of this act, notwithstanding anything to the contrary herein contained, (*a*) an amount sufficient to reimburse the commonwealth as provided in section fifteen of this act, (*b*) the sum of two hundred thousand dollars to establish the reserve fund, and (*c*) a sum not exceeding two hundred thousand dollars to the operations fund for working capital.

SECTION 3. The provisions of section nine of said chapter five hundred and forty-four, as amended by section two of this act, relating to the disposition of the revenues derived from the operation of the steamship line, shall supersede the discretionary power of the Authority to secure its bond by a trust agreement with a corporate trustee, but the resolution authorizing the bonds may provide for the holding and application of the proceeds of the bonds and said revenues by a depositary or fiscal agent as directed in such resolution.

SECTION 4. Said chapter 544 is hereby further amended by striking out section 13 and inserting in place thereof the following section:—*Section 13.* The Authority is hereby authorized and empowered from funds provided under the authority of this act to purchase the entire capital stock of the Massachusetts Steamship Lines, Incorporated, a Massachusetts corporation, at a price and upon such terms and conditions as the Authority may deem proper and as may be agreed by it and the seller or sellers. If the Authority shall be unable to purchase the entire capital stock of the corporation it may purchase such part as is available

for sale, but in no event less than ninety-five per cent of the shares of each class then outstanding. Upon such purchase, the Authority shall cause said corporation, after complying with the provisions of section forty-two of chapter one hundred and fifty-six of the General Laws, to transfer its property and assets to the Authority.

SECTION 5. This act shall not affect the validity of any and all acts of the Authority and of the Massachusetts Steamship Lines, Incorporated, performed under the provisions of section thirteen of chapter five hundred and forty-four of the acts of nineteen hundred and forty-eight or any rights which may have been acquired under said section.

Approved April 7, 1949.

APPENDIX D.

THE RESOLUTION.

The Resolution adopted by the Authority, authorizing the original issue of bonds and providing for later issues, is contained in a long document (Exhibit 4), which is on file with the record in this case, and contains the contract of the Authority with the bondholders. It was executed on April 20, 1949, as appears at the foot of page 3 of the Resolution, in the draft of the form of the bonds to be issued.

The making of the contract with the bondholders was duly authorized by paragraphs 8 and 12 of the Act of 1948.

Section 8 of the Act of 1948 authorizes the insertion in the Resolution of "covenants setting forth the duties of the Authority in relation to the acquisition, improvement, maintenance, operation, repair and insurance of the project, and the custody, safeguarding and application of all moneys."

Near the beginning of the Resolution (p. 2) it is provided, in section 101, that "all of the covenants, agreements and provisions of this Resolution shall be for the benefit and security of all and singular the present and future holders of the bonds and interest coupons so issued." And, in the form of the bond as set out in the Resolution (pp. 3, 4), it is provided that the bonds are issued pursuant to the Resolution, "reference to which is hereby made for the provisions, among others, with respect to the collection and disposition of the revenues, the funds charged with and pledged to the payment of the interest on and the principal of the bonds, the nature and extent of the security, the terms and conditions on which bonds are or may be issued, the rights, duties and obligations of the Authority and the rights of the holders of the bonds, and, by the acceptance of this bond, the holder hereof assents to all of the provisions of the Resolution."

The following sections of the Resolution which are here quoted or summarized include covenants the obligations of which are impaired by any statute which has the effect of increasing the operating expenses of the Authority and making it difficult, or even impossible, for the Authority to earn as much as the cost of service.

In section 410 (p. 20) the Authority covenants that "it will, subject to regulation by any governmental body having jurisdiction in respect thereof, adjust such rates and charges as may be necessary or proper to insure sufficient income to meet the cost of the service as defined in the act."

Section 403 (p. 20), providing for annual budgets, ends with the following covenant:

> "The Authority covenants that no current expenses will be incurred in any year unless the same shall be reasonable and necessary, and that it will not expend any amount or incur any indebtedness for current expenses in excess of the appropriate budget."

Section 404 (p. 21) provides for the transference of surplus earnings to a special account in the sinking fund called the "Redemption Account"; and section 408 (p. 22) provides that the money in this account shall be applied annually to the purchase or redemption of outstanding bonds.

In section 601 (p. 26) the first paragraph reads as follows:

> "The Authority covenants that it will promptly pay the principal of and the interest on every bond issued under the provisions of this Resolution at the place, on the dates and in the manner specified herein and in said bonds and in the coupons thereto appertaining, and any premium required for the retirement of said bonds by purchase or redemption, according to the true intent and meaning thereof. Such principal, interest and

premiums are payable solely from the funds provided therefor in the Act, which funds are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified. The interest on the bonds until the maturity thereof shall be payable only on presentation and surrender of the several coupons for such interest as they respectively fall due."

Section 603 (p. 27):

"The Authority further covenants that it will establish and enforce reasonable rules and regulations governing the use of the Steamship Facilities and the operation thereof, that all compensation, salaries, fees and wages paid by it in connection with the maintenance, repair and operation of the Steamship Facilities will be reasonable, that no more persons will be employed by it than are necessary, that it will operate the Steamship Facilities in an efficient and economical manner, that it will at all times maintain the same in good repair and in sound operating condition and will make all necessary repairs, renewals and replacements, and that it will comply with all valid acts, rules, regulations, orders and directions of any legislative, executive, administrative or judicial body applicable to the Steamship Facilities."

Section 604 (p. 27):

"The Authority further covenants that it will pay all taxes and assessments or other municipal or governmental charges, if any, lawfully levied or assessed upon the Steamship Facilities or upon any part thereof or upon any revenues therefrom when the same shall become due, that it will duly observe and comply with all valid requirements of any municipal or governmental

authority relative to the Steamship Facilities, that it will not create or suffer to be created any lien or charge upon the Steamship Facilities or any part thereof or upon the revenues therefrom ranking equally with or prior to the bonds, except the lien and charge of the bonds upon such revenues, and that it will pay or cause to be discharged, or will make adequate provision to satisfy and discharge, within sixty (60) days after the same shall accrue, all lawful claims and demands for labor, materials, supplies or other objects which, if unpaid, might by law become a lien upon the Steamship Facilities or any part thereof or upon the revenues therefrom; provided, however, that nothing in this Section contained shall require the Authority to pay or cause to be discharged, or make provision for, any such lien or charge, so long as the validity thereof shall be contested in good faith and by appropriate legal proceedings."

Section 608 (p. 28):

"The Authority covenants and agrees that none of the revenues or income of the Steamship Facilities will be used for any purpose other than as provided in this Resolution, and that no contract or contracts will be entered into or any action taken by which the rights of the bondholders might be impaired or diminished. The Authority further covenants that it will adopt such rules and regulations as may be necessary or appropriate to carry out the obligations of the Authority under the provisions of this Resolution and the Act."

Section 610 (p. 29):

"The Authority covenants that, so long as any bonds shall be outstanding and except as in this Resolution

otherwise permitted, it will not sell, lease or otherwise dispose of or encumber the Steamship Facilities or any part thereof and will not create or permit to be created any charge or lien on the revenues of the Steamship Facilities ranking equally with or prior to the charge or lien on such revenues of the bonds issued under this Resolution."

Section 902 (p. 35):

"The holders of bonds issued under this Resolution may protect and enforce their rights under the Act or under this Resolution by such suits, actions or special proceedings in equity or at law, either for the specific performance of any covenant or agreement contained herein or in aid or execution of any power herein granted or for the enforcement of any proper legal or equitable remedy, as they shall deem most effectual to protect and enforce such rights. But no such suit, action or proceeding may be instituted by the holder or holders of less than ten per centum (10%) in principal amount of the bonds then outstanding, and all such suits, actions and proceedings shall be instituted, had and maintained for the benefit of all holders of such outstanding bonds and coupons."

Section 908 (p. 36):

"The officers and agents of the Authority are hereby authorized and directed to do all the acts and things required of them by the bonds and this Resolution, for the full, punctual and complete performance of all of the terms, covenants, provisions and agreements contained in the bonds and in this Resolution."

APPENDIX E.

THE MASSACHUSETTS RESOLVES OF 1957 AND 1958.

CHAPTER 78 OF 1957.

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO THE OPERATION OF THE NEW BEDFORD, WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY.

Resolved, That an unpaid special commission, to consist of three members of the senate to be designated by the president thereof, five members of the house of representatives to be designated by the speaker thereof, and two persons to be appointed by the governor, is hereby established for the purpose of making an investigation and study of the operation of the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. Said commission shall be provided with quarters in the state house or elsewhere, may hold hearings, may require by summons the attendance and testimony of witnesses and the production of books and papers, may travel within the commonwealth, and may expend for expert, clerical and other services and expenses, such sums as may be appropriated therefor. Said commission shall report to the general court the results of its investigation and study, and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect, by filing the same with the clerk of the house of representatives on or before the fourth Wednesday of January, nineteen hundred and fifty-eight.

Approved May 27, 1957.

Chapter 64 of 1958.

Resolve reviving and continuing the special commission to study and investigate the operation of the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.

Resolved, That the unpaid special commission established by chapter seventy-eight of the resolves of nineteen hundred and fifty-seven is hereby revived and continued for the purpose of continuing its investigation and study of the operation of the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority.

Said commission shall be provided with quarters in the state house or elsewhere, may hold hearings, may travel within and without the commonwealth, and may expend for expert, clerical and other services and expenses the unexpended balance available in item 0258-02 of section two of chapter four hundred and two of the acts of nineteen hundred and fifty-seven, and such additional sums as may be appropriated therefor.

Said commission shall report to the general court the results of its investigation and study, and its recommendations, if any, together with drafts of legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives on or before the last Tuesday of December in the year nineteen hundred and fifty-eight. *Approved April 16, 1958.*

APPENDIX F.

THE ORDER APPEALED FROM.

The original order of the Superior Court, entered March 21, 1957, was as f llows (R. 29):

> "This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it is ordered that the following entry of judgment may be and the same hereby is made:
>
> "It is hereby ORDERED that a peremptory writ of mandamus issue commanding the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, and Gibbs W. Sherrill, Felix F. Perrone, C. Edward Hall, Robert M. Love and Robert Backus, in their official capacities as members of said New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, that they be and are hereby directed to comply with the provisions of Chapter 747 of the Statutes of 1956 by taking such steps as may be reasonable and necessary to carry out the intent and purposes of the Legislative mandate.
>
> DAVID G. NAGLE
> Justice of the Superior Court."

The entry of the order was suspended by bills of exceptions filed by the respondents (R. 30, 33), but became final on January 16, 1958, upon receipt of the rescript (dated the day before) of the Supreme Judicial Court reading: "Exceptions overruled" (R. 40).

The opinion of the court filed with the rescript ends with the following sentences (R. 53):

> "The scope of the order for judgment which was in general to comply with St. 1956, c. 747, was too broad.

Only two specific subjects were before the court, that is, winter service and the construction of a ferry slip. The order should be reframed and confined to these two particular matters and as so moulded should be affirmed."

Pursuant to this direction, which involved only a ministerial act, the following order was entered on May 21, 1958, as of January 16, 1958 (R. 60):

"This case came on to be heard after rescript from the Supreme Judicial Court overruling the exceptions of the respondents and was argued by counsel and thereupon consideration thereof it is ordered that the following entry of judgment may be and the same hereby is made.

"It is hereby ORDERED that a peremptory writ of mandamus issue commanding the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, and Paul W. Glennon, Felix F. Perrone, C. Edward Hall, Robert M. Love and Robert Backus, in their official capacities as members of said New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, that they be and are hereby directed to provide regularly scheduled ferry runs daily throughout the year of the type that will accommodate standard size trucks and semi-tractor-trailer vehicles to and from the port of New Bedford and adequate ferry slips or transfer bridges shall be constructed and maintained at said port of New Bedford to facilitate and accommodate said vehicular traffic.

"The foregoing order is hereby entered as of January 16, 1958.

DAVID G. NAGLE
Justice of the Superior Court."

May 21, 1958.

[This order became, by virtue of the rescript of the Supreme Judicial Court, the final judgment for purposes of the present appeal. See *Cole* v. *Violette*, 319 U.S. 581.]

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 273

BOSTON FIVE CENTS SAVINGS BANK, THE NEW ENGLAND TRUST COMPANY AND OLD COLONY TRUST COMPANY,
Appellants,

v.

CITY OF NEW BEDFORD,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

MOTION TO DISMISS APPEAL, AND ACCOMPANYING BRIEF.

JOSEPH C. DUGGAN,
City Solicitor for New Bedford,
Member of the Bar of the Supreme Court,
WILLIAM B. PERRY, JR.,
BERNARD KESTENBAUM,
Assistant City Solicitors,
Attorneys for Appellee.

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v.

CITY OF NEW BEDFORD,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

MOTION TO DISMISS APPEAL.

Now comes the appellee in the above-entitled cause and moves that the Honorable Court enter an order dismissing the appeal on the ground that section 1 of chapter 747 of the Massachusetts Acts of 1956 does not impair any obligation of any contract to which the appellants are parties, nor does it deprive the appellants of any vested rights;

wherefore no substantial federal question is presented by the appeal, and said appeal should be dismissed.

JOSEPH C. DUGGAN,

City Solicitor for New Bedford,
Member of the Bar of the Supreme Court,
WILLIAM B. PERRY, JR.,
BERNARD KESTENBAUM,
Assistant City Solicitors,
Attorneys for Appellee.

In the
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BOSTON FIVE CENTS SAVINGS BANK, THE NEW ENGLAND TRUST COMPANY AND OLD COLONY TRUST COMPANY,

Appellants,

v.

CITY OF NEW BEDFORD,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

BRIEF ACCOMPANYING APPELLEE'S MOTION TO DISMISS.

This is an appeal from the judgment of the Superior Court of Massachusetts entered on January 16, 1958, pursuant to a rescript of the Supreme Judicial Court of Massachusetts, received on January 16, 1958; and appellee respectfully submits this brief in support of its motion to dismiss the appeal on the ground that it presents no substantial federal question; wherefore the Supreme Court of

the United States ought not to take jurisdiction of the case, and should dismiss the appeal.

(a) Opinions Below.

The Supreme Judicial Court's original decision is reported in Mass. Advance Sheets (1958), p. 107, and in 147 N.E. (2d) 187, and is dated January 15, 1958. However, the Court canceled that opinion, and filed a new one on March 14, 1958, dated back to January 15. This opinion, reported in Mass. Advance Sheets (1958), p. 489, and in 148 N.E. (2d) 637, stated more clearly the basis for the Court's judgment.

(b) Grounds on which Dismissal of the Appeal is Sought.

The appellants have based their appeal wholly on the contentions that Section 1 of Chapter 747 of the Massachusetts Acts of 1956 is invalid under Section 10 of Article I and the Fourteenth Amendment to the United States Constitution.

The appellee contends that the Act of 1956 (*supra*) has not impaired the obligations of the contracts: (*a*) between the appellants and the Commonwealth of Massachusetts, and (*b*) between the appellants and the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, and that the appellants have not been deprived of any vested rights without compensation by the Act of 1956. These being the sole bases of the appeal, the absence of a federal question becomes apparent, and an order of dismissal should be entered.

(c) Questions Presented.

1. Does Section 1 of Chapter 747 of the Massachusetts Acts of 1956 impair the obligations of the contracts be-

tween the Commonwealth of Massachusetts and the bondholders, or of those between the Steamship Authority and the bondholders, thereby violating Section 10, Article I, of the United States Constitution?

2. Does Section 1 of the Act of 1956 deprive the bondholders of vested rights without compensation, thereby violating the Fourteenth Amendment to the United States Constitution?

(d) Statement of the Case.

In 1948 the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority was created by Chapter 544 of the Massachusetts Acts of that year. Its purpose was to provide transportation of persons and the necessaries of life for the two island communities, Martha's Vineyard and Nantucket. Broad powers were granted to the Authority to purchase, construct, maintain and operate the necessary vessels and facilities. The issuance of bonds was authorized, but Section 2 of the statute declared that the Commonwealth was not pledging its credit to support the bonds ". . . except as herein provided." Section 8 requires the setting up of a reserve fund out of which principal and interest are to be paid. Surplus funds are to go into a redemption fund to be used for purchasing or retiring outstanding bonds.

By Section 9, when income is insufficient to meet the cost of service (defined to include interest and amortization on the bonds, Section 5), the reserve fund shall be used to make up the deficiency and, if that fund is insufficient at the end of the year, the Treasurer of the Commonwealth shall pay over the amount of the deficiency, less the amount in the reserve fund. A tax district, made up of the cities and towns benefited and served by the Steamship

line, is to reimburse the Commonwealth according to certain proportions. Tax exemption and freedom from competition from other steamship lines are provided for by Sections 6 and 7, and Section 11 renders the bonds available for investment quite broadly. Section 6, which authorizes the issuance of bonds, contains the statement which the appellants consider important:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds."

Whatever changes effected by the amendments of the Act of 1949, Chapter 142, as are pertinent have been included in the above quotation.

In 1949 the proceeds of a $4,100,000 bond issue were used to acquire the existing property, renovate it and begin operations. The construction of a new ferry-type vessel required a second issue of $2,000,000 in 1955. A further issue of $250,000 was necessary in 1957 to complete the vessel, and another $100,000 was authorized for the development of pier facilities in New Bedford necessary to accommodate the new ferry when it is put into service. Nearly the total amount of these issues is outstanding.

The Resolution of the Authority authorizing the bond issues was adopted on April 20, 1949. By its terms, acceptance of the bonds by a holder constitutes assent to the provisions of the Resolution (Section 101). The provisions of the 1948 statute relative to the bonds, the responsibilities of the Commonwealth thereto, and method of handling deficiencies are restated. Other provisions contained covenants to conduct operations efficiently, incurring only reasonable and necessary expenses, employ-

ing no more men than are necessary, and fixing rates in order to meet the cost of service. Principal and interest are to be paid solely from the funds provided therefor in the Act. Section 902 provides that the holders of not less than 10% of the outstanding bonds may enforce any rights given the bondholders. The three appellants own in the aggregate $643,000 of the Authority's outstanding issues of nearly $6,000,000, thereby qualifying to enforce their alleged rights.

The Authority has been unable to meet the cost of service out of current revenues in any year except the first, 1949. The deficit in 1956 was $111,918.33. A deficiency of $340,000 was expected in the proposed budget of 1957. The reserve fund has been exhausted.

The Authority sought to curtail winter service to the mainland port of New Bedford in order to reduce operating expenses. The City of New Bedford, in two suits, attempted to prevent this action of the Authority. *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 329 Mass. 243. *Same* v. *Same*, 330 Mass. 422. The Supreme Judicial Court construed the Act of 1948 as conferring broad powers on the Authority, including the matter, as one of administrative detail, of determining whether winter service to New Bedford could be dispensed with for economy reasons.

Following this decision, winter service to New Bedford was actually suspended during the 1955-56 season. The Legislature then went into action, enacting Chapter 747 of the Massachusetts Acts of 1956. Section 1 required that the Authority maintain daily service year round to the port of New Bedford, and that it construct the dock facilities necessary to accommodate the new ferry-type vessel about to be placed in service. Section 2 of the Act changed the proportional financial responsibilities of the cities and towns in the tax district, increasing New Bedford's share

from 15% to 40%, and decreasing the Islands' share from 75% to 50%.

In spite of the statute, the Authority voted not to construct the dock facilities demonstrated to be necessary to accommodate the new ferry, whereupon an action for mandamus was initiated by the City. The Superior Court granted the writ over the exceptions of the Authority and of the three banks which intervened at the origin of the suit on behalf of the Authority. The Supreme Judicial Court overruled their exceptions relative to questions of evidence and the Constitutional issues. The three banks now invoke the jurisdiction of this Court to review that decision.

(e) Argument.

I. No Contract Obligations of the Bondholders have been Impaired by Section 1 of Chapter 747 of the Massachusetts Acts of 1956.

The Supreme Court of the United States has jurisdiction in a cause such as this only when the state court gives effect to legislation impairing the obligations of a prior contract. *Winona and St. Peter Railroad Co.* v. *Plainview*, 143 U.S. 371, 36 L. Ed. 191. When such is alleged, the Supreme Court will determine for itself the nature of the contracts involved and whether they have been impaired by the statute. *Northern Pacific Railway Co.* v. *Minnesota*, 208 U.S. 583, 52 L. Ed. 630.

The gist of the Act of 1956 is that the Authority is required by it to maintain daily ferry service of a particular type, and construction of a ferry slip, at the port of New Bedford. Its significance is that it has made mandatory what was formerly a matter of the Authority's discretion, and thus the required type of service to New Bedford can-

not be suspended nor can the Authority refuse to construct a ferry slip merely in order to reduce operating expenses.

The contract provision which immediately must be considered, as a result, is that which appellants consider most important. It is that part of Section 6 of the Authority-creating statute of 1948 concerned with the issuance of bonds, reading as follows:

> "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect *adversely* the interests and rights of the holders of such bonds."

The key word is, obviously, "adversely." Its presence indicates recognition of the fact that changes might indeed be effected, but that, in so doing, bondholders' rights were to be respected only in so far as they shall not be deleteriously impinged upon or reduced.

The provision being meaningless standing by itself, we must look to other terms of the Act of 1948, and of the Resolution authorizing the bond issues, in order to determine whether any of them constitute contract obligations adversely affected by the Act of 1956.

It should be noted at this point that none of the obligations of contract, at least as enumerated by the appellants, has been altered, amended or impaired by provisions of the 1956 statute.

(*a*) The primary obligations of the Authority to pay interest and principal remain unaffected. No matter how high the current costs are as compared to revenues, the Treasury of the Commonwealth is available to make up any deficiencies, with the ultimate financial liability resting on the tax district made up of the communities served by the Steamship Authority. This provision is contained

both in the Act of 1948 in Section 9, and in the Resolution, Section 411. It is the real basis for the security of the bonds. Whether the revocation of it would constitute an impairment of contract obligation is not material to this case. "One cannot invoke [in order to] defeat a law an apprehension of what might be done under it. . . ." "To complain of a ruling one must be made the victim of it." *Lehon* v. *Atlanta*, 242 U.S. 53, 61 L. Ed. 145, 37 S. Ct. 70.

If anything, the security has been put on a more firm basis by Section 2 of the Act of 1956, since New Bedford, with its larger population and valuation as a tax source, has been charged with a much larger proportion (1/6 to 2/5) of the tax district's liability for deficits.

(*b*) The covenants contained in Sections 403 and 603 of the Resolution concerning "reasonable" and "necessary" rules, wages and employment policy, and in Section 410 concerning the fixing of rates to meet the cost of service, are all flexible obligations which must be tied to a standard in order to be meaningful. That standard is the purpose for which the Authority was created as a public transportation facility, as declared by the original statute of 1948, and as altered by the Act of 1956. The obligations of the Authority have not been changed; but what is "reasonable" and "necessary" must be determined in the light of the requirements of year-round service and a ferry slip for New Bedford.

(*c*) To say that the cost of year-round daily service of a particular type and construction of a ferry slip for the City of New Bedford constitutes a lien or charge upon revenues equal or prior to the bonds is to say that the cost of daily service to the Islands is likewise such a lien or charge. No one would contend that daily service to the Islands is not necessary to fulfill the policy of the Act of 1948. The covenants contained in Sections 604 and 610

not to permit such a charge are not affected by the 1956 statute in any manner.

(*d*) Even though daily service to New Bedford was not fixed at the time the Resolution was adopted, it was certainly contemplated, so that the revenues are not being diverted to a new or different purpose in contravention of the obligations imposed by Section 608.

(*e*) The Resolution contains a covenant to transfer surplus funds to a redemption account, as the Authority was required to do by Section 2 of the 1949 amendment. But this does not constitute a mandate compelling that there be surplus funds to be transferred to the account. The obligation of the Authority to use the surplus funds, if there be any, to redeem or purchase outstanding bonds remains unimpaired.

(*f*) All other rights of the bondholders relative to tax-exemption, the general availability of the bonds for investment, and their remedies for enforcement are not affected in any way by the Act of 1956.

Obviously, none of the contract obligations have been impaired by the Act of 1956. As long as the obligation of full performance is not taken away, there is no impairment. *Curtis* v. *Whitney*, 13 Wall. (U.S.) 68, 20 L. Ed. 513.

In truth, the Act of 1956 was no more than a new and clarified declaration of policy by the Legislature. New Bedford is to be regarded as an integral part of the Steamship Authority scheme. This is demonstrated both by the requirements of service and facilities and by the increased financial liability of the City. Whether the Legislature was wise in arriving at this course of action is not the concern of this Court. *Norman* v. *Baltimore & Ohio Railway Co.*, 294 U.S. 240, 79 L. Ed. 885, 55 S. Ct. 407. Public policy is the realm of the Legislature, not the Courts. *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78

L. Ed. 413, 54 S. Ct. 231. This is particularly so in the realm of public transportation.

II. Section 1 of the Act of 1956 has Not Deprived the Bondholders of Any Vested Rights without Compensation.

Appellants' contentions on this matter amount to no more than a restatement of their alleged contract rights under the banner of the "due process" clause of the Fourteenth Amendment. Since these rights have been shown to be unaffected by the Act of 1956, there is no basis for their argument.

In order to constitute a taking there must be actual interference with, or disturbance of property rights as distinguished from injuries which are merely consequential or incidental. *Noble State Bank* v. *Haskell*, 219 U.S. 104, 55 L. Ed. 112. On the facts here there can be no basis for finding "a taking" in view of the fact that there has been no impairment of contract obligation. Cf. also *St. Paul Gas Light Co.* v. *St. Paul*, 181 U.S. 142, 45 L. Ed. 788, 21 S. Ct. 575, and *Smith* v. *Jennings*, 206 U.S. 276, 51 L. Ed. 1061, 27 S. Ct. 610.

(f) Conclusion.

The foundation on which the appellants have laid their appeal is manifestly an illusory one. The true nature of their purpose is revealed by their expressions of dissatisfaction and actual charges of bias directed at the Legislature and the judicial department of the Commonwealth. The policy of the local law has gone against their wishes, and now they are seeking a reversal of that policy in the highest Court of the land. Such an adjudication by this

Court would do violence to our governmental system. The appellee respectfully requests that the appeal be dismissed for want of jurisdiction, there being no substantial federal question involved in the appeal.

Respectfully submitted,

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